

AF 3427

TRANSMITTAL OF APPEAL BRIEF (Small Entity)

Docket No.  
97-557

Re Application Of: JAY S. WALKER et al.

Application No.	Filing Date	Examiner	Customer No.	Group Art Unit	Confirmation No.
09/045386	March 20, 1998	A. J. Rudy	22927	3627	9821

Invention:

METHOD AND APPARATUS FOR CONTROLLING THE PERFORMANCE OF A SUPPLEMENTARY PROCESS AT A POINT OF SALE TERMINAL

COMMISSIONER FOR PATENTS:

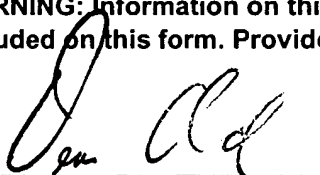
Transmitted herewith is the Appeal Brief in this application, with respect to the Notice of Appeal filed on:  
September 10, 2003

☒ Applicant claims small entity status. See 37 CFR 1.27

The fee for filing this Appeal Brief is: paid February 10, 2004

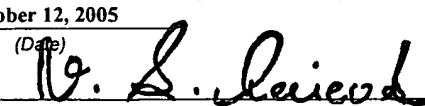
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Dated: October 12, 2005

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I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.8(a)] on October 12, 2005 (Date)  Signature of Person Mailing Correspondence Veronika S. Leliever Typed or Printed Name of Person Mailing Correspondence
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cc:



**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
MODIFIED THIRD APPEAL BRIEF**

**Appellants:**

Jay S. Walker,  
Andrew S. Van Luchene,  
Dean Alderucci

Group Art Unit: 3627

Examiner: A. Rudy

Application No.:  
09/045,386

Filed:  
March 20, 1998

For:  
METHOD AND APPARATUS FOR  
CONTROLLING THE PERFORMANCE  
OF A SUPPLEMENTARY PROCESS AT A  
POINT OF SALE TERMINAL

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Appellants appeal to the Board of Patent Appeals and Interferences from the decision of the Examiner in the Office Action mailed November 23, 2004. That Office Action reopened prosecution after the Second Appeal Brief, which was filed on September 9, 2004.

This Appeal Brief is filed in response to the Notice of Non-Compliant Appeal Brief mailed September 30, 2005.

With respect to the threatened restriction, Appellants note that for each pending method claim, there is a corresponding apparatus that performs the method. Also, the claims have been repeatedly examined, and prosecution has already been reopened twice after two Appeal Briefs were filed.

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## **RESPONSE TO NOTICE OF NON-COMPLIANT AMENDMENT**

The Appeal Brief is filed in response to the Notice of Non-Compliant Appeal Brief mailed September 30, 2005.

In a telephone conversation on October 11, 2005, Examiner Rudy and Appellants' representative agreed that claim **38** was not in fact rejected, although there was a sentence on page 3, paragraph 6 of the Office Action mailed November 23, 2004 that claim **38** was rejected for indefiniteness.

Also in that telephone conversation, Examiner Rudy informed Appellants' representative that more references to the specification and figures should be added to the Section entitled "Summary of the Claimed Subject Matter".

According to Examiner Rudy, there were no other issues that Appellants needed to address in order to render the Appeal Brief fully compliant.

Therefore, the present Appeal Brief differs from the previous Appeal Brief (filed on April 25, 2005) in that more references to the specification and figures have been added to the Section entitled "Summary of the Claimed Subject Matter".

## **REAL PARTY IN INTEREST**

The present application is assigned to Walker Digital, LLC, 1177 High Ridge Road, Suite 128, Stamford, CT 06905.

**RELATED APPEALS AND INTERFERENCES - *NONE***

Appellants, Appellants' legal representative and Appellants' assignee know of no interferences or appeals that will directly affect, be directly affected by, or have a bearing on the Board's decision in the pending appeal.

## **STATUS OF CLAIMS**

**Claims 11, 14, 25, 26 and 33 - 40** are pending.

**Claims 11, 14, 25 33 and 35 - 40** are rejected and are being appealed.

**Claims 26 and 34** are allowed.

Claim **38** was not rejected, since no basis for such rejection was ever provided in the Office Action and the previous bases for rejecting claim **38** were not reasserted. Accordingly, claim **38** is assumed to be allowed and any subsequent rejection of claim **38** would necessarily constitute a new rejection.



**STATUS OF AMENDMENTS - *NONE***

No Amendments were filed subsequent to the rejection of the claims in the Office Action mailed November 23, 2004.

## **SUMMARY OF CLAIMED SUBJECT MATTER**

Concise explanations of the independent claims are provided below. The summaries include sufficient information about the claimed subject matter so that an informed review of the Examiner's adverse determination of patentability can be made.

As required by 37 C.F.R. § 41.37(c)(1)(v), reference is made to the Specification. Any such reference:

(i) is by way of example of the claimed subject matter only, and is not necessarily exclusive of other examples;

(ii) is to be considered as potentially useful in clarifying the particular subject matter of the particular independent claim being discussed (and not other claims or "the invention" as a whole), unless explicitly stated otherwise; and

(iii) is not to be considered as broadening or narrowing the scope of any recited term from its meaning to one of ordinary skill in the art, unless explicitly stated otherwise.

Claims 11, 14, 25, 33 and 35 - 40 are independent.

### **1. Independent Claim 11**

Independent Claim 11 is reproduced below:

11. A method for controlling the performance of a supplementary process at a point-of-sale terminal, comprising:

measuring an activity rate of a point-of-sale terminal; and  
providing a supplementary product offer in accordance with the activity rate and an offer schedule;

in which the offer schedule comprises a set of supplementary product offers, each supplementary product offer corresponding to a predetermined range of activity rates, and

in which successively time-consuming supplementary product offers correspond to successively greater ranges of activity rates.

In one example of the claimed subject matter, one or more POS terminals measure one or more criteria, such as the activity rate of the POS terminal.

[*Present Application*, page 3, lines 27 - 28] For example, the POS terminal may measure the number of completed transactions per period of time, the number of items purchased through the POS terminal per period of time, the number of upsells accepted by customers per period of time, the number of customers in a store or the number of customers in the vicinity of the POS terminal. [*Present Application*, page 3, lines 28 - 32]

The POS terminal provides a supplementary product offer in accordance with the offer schedule. The offer schedule may specify that time-consuming offers (offers with a low "offer speed") are made during periods of low terminal activity, while quicker offers (offers with a high "offer speed") are made during

periods of higher terminal activity. [*Present Application*, page 5, lines 1 - 6; *see also* page 8, line 15 - 17; page 8, line 25 - page 9, line 4]

Figures 4 and 7 depict tables 60 and 120 respectively, each of which illustrates an offer schedule that depend on activity rates.

## **2. Independent Claim 14**

Independent Claim **14** recites an apparatus which performs a method corresponding to claim **11** described immediately above.

One embodiment of such an apparatus is POS terminal 10 depicted in FIG. 1, and described in the specification at page 5, line 12 - page 6, line 10.

## **3. Independent Claim 25**

Independent Claim **25** is reproduced below:

25. A method for controlling the performance of a supplementary process at a point-of-sale terminal, comprising:

measuring an activity rate of a point-of-sale terminal; and

if the activity rate is less than a predetermined threshold,

determining an upsell in dependence on a purchase,

determining an upsell price in dependence on the purchase, and

offering to exchange the upsell price for the upsell.

In one example of the claimed subject matter, one or more POS terminals measure one or more criteria, such as the activity rate of the POS terminal. [*Present Application*, page 3, lines 27 - 28] For example, the POS terminal may measure the number of completed transactions per period of time, the number of items purchased through the POS terminal per period of time, the number of upsells accepted by customers per period of time, the number of customers in a store or the number of customers in the vicinity of the POS terminal. [*Present Application*, page 3, lines 28 - 32]

If the activity rate is less than a predetermined threshold, then an upsell price (e.g., the amount of change due) is determined based on the purchase. For example, a customer purchasing a first product for \$1.74 and tendering \$2.00 may be offered a second product in lieu of the \$0.26 change due. The upsell price, \$0.26, thus depends on the purchase price \$1.74. [*Present Application*, page 2, lines 20 - 24]

An upsell is also determined in dependence on a purchase. Various manners of determining an upsell in dependence on a purchase (such as, e.g., selecting an upsell from a table based on an amount of change due the customer) are described in U.S. Patent No. 6,119,099, which the Present Application incorporates by reference for describing such a determination. [*Present Application*, page 8, lines 3 - 8]

This upsell is offered to be exchanged for the upsell price (e.g., for the change due). [*Present Application*, page 5, lines 7 - 8]

**4. Independent Claim 33**

Independent Claim 33 is reproduced below:

33. A method for controlling performance of a supplementary process at a point-of-sale terminal, comprising:

receiving an override signal; and

if the override signal indicates performance of a supplemental process,  
determining an upsell in dependence on a purchase,  
determining an upsell price in dependence on the purchase, and  
offering to exchange the upsell price for the upsell.

In one example of the claimed subject matter illustrated in FIG. 5, an apparatus 80 includes an override decision manager 82 which receives input from an override signal circuit 84 and from an automatic control signal circuit 86.

[*Present Application*, page 9, lines 12 - 13] The override signal circuit 84 is a device that provides an override signal, such as a switch in communication with the POS terminal. The override signal circuit 84 may be one or more keys on the input device 16 (FIGS. 1 and 2), or may be another device that transmits and/or generates signals. [*Present Application*, page 9, lines 13 - 17]

The override decision manager 82 receives the override signal and control signal from circuits 84 and 86, respectively, and generates in dependence thereon

an "enhanced control" signal for controlling performance of the supplementary process. The enhanced control signal is transmitted to a system 88 for performing a supplementary process. [*Present Application*, page 9, lines 19 - 22]

If the override signal indicates performance of a supplemental process, then an upsell price (e.g., the amount of change due) is determined based on the purchase. For example, a customer purchasing a first product for \$1.74 and tendering \$2.00 may be offered a second product in lieu of the \$0.26 change due. The upsell price, \$0.26, thus depends on the purchase price \$1.74. [*Present Application*, page 2, lines 20 - 24]

An upsell is also determined in dependence on a purchase. Various manners of determining an upsell in dependence on a purchase (such as, e.g., selecting an upsell from a table based on an amount of change due the customer) are described in U.S. Patent No. 6,119,099, which the Present Application incorporates by reference for describing such a determination. [*Present Application*, page 8, lines 3 - 8]

This upsell is offered to be exchanged for the upsell price (e.g., for the change due). [*Present Application*, page 5, lines 7 - 8]

## **5. Independent Claim 35**

Independent Claim 35 is reproduced below:

35. A method for controlling performance of a supplementary process at a point-of-sale terminal, comprising:

measuring an activity rate of a point-of-sale terminal; and  
if the activity rate is below a first predetermined threshold, offering a first upsell having an first offer speed; and  
if the activity rate is above a second predetermined threshold, offering a second upsell having a second offer speed greater than the first offer speed.

In one example of the claimed subject matter, one or more POS terminals measure one or more criteria, such as the activity rate of the POS terminal. [*Present Application*, page 3, lines 27 - 28] For example, the POS terminal may measure the number of completed transactions per period of time, the number of items purchased through the POS terminal per period of time, the number of upsells accepted by customers per period of time, the number of customers in a store or the number of customers in the vicinity of the POS terminal. [*Present Application*, page 3, lines 28 - 32]

Time-consuming offers (offers with a low "offer speed") are made during periods of low terminal activity, while quicker offers (offers with a high "offer speed") are made during periods of higher terminal activity. [*Present Application*, page 5, lines 1 - 6; *see also* page 8, line 15 - 17; page 8, line 25 - page 9, line 4]

## **6. Independent Claim 36**

Independent Claim 36 recites an apparatus which performs a method corresponding to claim 35 described immediately above.



One embodiment of such an apparatus is POS terminal 10 depicted in FIG. 1, and described in the specification at page 5, line 12 - page 6, line 10.

**7. Independent Claim 37**

Independent Claim 37 is reproduced below:

37. A method for controlling the performance of a supplementary process at a point-of-sale terminal, comprising:

- measuring an activity rate of a point-of-sale terminal; and
- if the activity rate is less than a predetermined threshold,
  - determining an upsell in dependence on a purchase,
  - determining an upsell price in dependence on change due from the purchase, and
  - offering to exchange the upsell price for the upsell.

In one example of the claimed subject matter, one or more POS terminals measure one or more criteria, such as the activity rate of the POS terminal.

[*Present Application*, page 3, lines 27 - 28] For example, the POS terminal may measure the number of completed transactions per period of time, the number of items purchased through the POS terminal per period of time, the number of upsells accepted by customers per period of time, the number of customers in a

store or the number of customers in the vicinity of the POS terminal. [*Present Application*, page 3, lines 27 - 32]

If the activity rate is less than a predetermined threshold, then an upsell price is determined based on the amount of change due from the purchase. For example, a customer purchasing a first product for \$1.74 and tendering \$2.00 may be offered a second product in lieu of the \$0.26 change due. The upsell price, \$0.26, thus depends on the purchase price \$1.74. [*Present Application*, page 2, lines 20 - 24]. The upsell price may be based on the amount of change due in numerous ways (e.g., rounded to the nearest ten cents).

An upsell is also determined in dependence on a purchase. Various manners of determining an upsell in dependence on a purchase (such as, e.g., selecting an upsell from a table based on an amount of change due the customer) are described in U.S. Patent No. 6,119,099, which the Present Application incorporates by reference for describing such a determination. [*Present Application*, page 8, lines 3 - 8]

This upsell is offered to be exchanged for the upsell price (e.g., for the change due).

## **8. Independent Claim 38**

Independent Claim 38 recites an apparatus which performs a method corresponding to claim 37 described immediately above.

One embodiment of such an apparatus is POS terminal 10 depicted in FIG. 1, and described in the specification at page 5, line 12 - page 6, line 10.

**9. Independent Claim 39**

Independent Claim 39 is reproduced below:

39. A method, comprising:
- measuring an activity rate of a point-of-sale terminal;
  - determining an upsell price in dependence on change due from a purchase,
  - if the activity rate is below the first predetermined threshold, offering a first upsell for a supplementary product, the first upsell having an first offer speed;
  - if the activity rate is above the second predetermined threshold, offering a second upsell for a supplementary product, the second upsell having a second offer speed greater than the first offer speed; and
  - exchanging the upsell for the offered upsell price.

In one example of the claimed subject matter, one or more POS terminals measure one or more criteria, such as the activity rate of the POS terminal. [*Present Application*, page 3, lines 27 - 28] For example, the POS terminal may measure the number of completed transactions per period of time, the number of items purchased through the POS terminal per period of time, the number of upsells accepted by customers per period of time, the number of customers in a store or the number of customers in the vicinity of the POS terminal. [*Present Application*, page 3, lines 28 - 32]

Time-consuming offers (offers with a low "offer speed") are made during periods of low terminal activity, while quicker offers (offers with a high "offer speed") are made during periods of higher terminal activity. [*Present Application*, page 5, lines 1 - 6; *see also* page 8, line 15 - 17; page 8, line 25 - page 9, line 4]

## **GROUND OF REJECTION TO BE REVIEWED ON APPEAL**

Claims **11, 25, 33, 35, 37 and 39** (i.e. all pending method claims) stand rejected under 35 U.S.C. § 101 as being directed to non-statutory subject matter.

Claims **11, 14, 35, 36, 39 and 40** stand rejected under 35 U.S.C. § 112, ¶ 2 as being indefinite.

## ARGUMENT

### 1. Summary of Arguments

#### 1.1. "Technological Arts" test has no basis in law

One issue in this case is whether there is any basis in law for the Examiner's legal test for determining whether a claim is directed to non-statutory subject matter under Section 101.

As best as Appellants understands the rejection of the claims for being directed to non-statutory subject matter, the basis for that rejection is that the claimed steps "can be performed in the mind of a user or by use of a pencil and paper." (Office Action, page 3, 1<sup>st</sup> paragraph) In other words, the Examiner's position is that a claim is nonstatutory if:

- (a) the claim does not *preclude* a 'mental' embodiment even if it covers computer-performed embodiments; and / or
- (b) the claim does not *preclude* a manual (e.g., 'pencil and paper') embodiment even if it covers computer-performed embodiments.

There is no legal authority for the Examiner's proposition that claims must preclude mental and manual embodiments. The legal test for the presence of statutory subject matter is only that a claimed process or apparatus produce a "useful, concrete and tangible result". See, e.g., State Street Bank & Trust Co. v. Signature Fin. Group, Inc., 149 F.3d 1368, 1375, 47 U.S.P.Q.2D 1596 (Fed. Cir. 1998), cert. denied, 525 U.S. 1093, 142 L. Ed. 2d 704, 119 S. Ct. 851 (1999)

The Examiner's Section 101 two-prong test departs starkly from current Federal Circuit law. In particular, the Examiner's Section 101 test flies in the face of the definitive "practical application" standard, rendered in State Street Bank v. Signature Financial Trust, 149 F.3d 1368, 47 USPQ2d 1596 (Fed. Cir. 1998), cert. denied, 119 S. Ct. 851 (1999) and AT & T Corp. v. Excel Communications Inc., 172 F.3d 1352, 50 USPQ2d 1447 (Fed. Cir. 1999), for determining whether subject matter is statutory. In fact, the Examiner has not even addressed the current standard as defined by these two cases.

The Examiner's Section 101 two-prong test is also contrary to law because it necessarily defines a new category of subject matter (i.e., claimed processes that do not recite "technology") as being unpatentable under Section 101. There are exactly and only three categories of unpatentable subject matter that have been recognized by the Supreme Court: abstract ideas, natural phenomena, and laws of nature. Diamond v. Diehr (1981). See also, MPEP § 2106, p. 2100-11 (8th ed. Rev. 2, May 2004). The Examiner cannot establish that Appellants' claims fall into any of these exceptions.

### **1.2. The Claims are directed to statutory subject matter**

Another issue in this case is whether, regardless of whether the Examiner's test has any basis in law, the claims are directed to statutory subject matter. All the claims produce a useful, concrete, and tangible result, and the claims are therefore statutory.

Although not recognized by the Examiner, the existence of a useful, concrete, and tangible result necessarily means that the invention is not only an

abstract idea, per AT&T and State Street Bank. The Examiner's attempt to characterize an alleged failure to be within "the technological arts" as equivalent to being "only an abstract idea" is baseless and contradictory.

There are only three exceptions to statutory subject matter: abstract ideas, laws of nature, and natural phenomena. Since the claims fall into none of those exceptions, the claims must define statutory subject matter.

### **1.3. The Claims are not Indefinite**

Another issue in this case is whether various claims are indefinite because certain terms in the claims do not appear verbatim in the specification.

The Examiner has not even attempted to present a prima facie showing that one of ordinary skill in the art would not understand the scope of the claim when the claim is read in light of the rest of the specification.

The entirety of the Examiner's basis for rejecting various claims as indefinite are (1) the conclusory statements that certain terms are "not clear", and (2) the conclusory statements that "support for such [terms] is not apparent" from the application. Office Action, page 4.

The rejections for indefiniteness are based on terms which lack explicit, 'word-for-word' antecedent basis in the specification. However, explicit antecedent basis is not required for a claim to have an ascertainable meaning to one of ordinary skill in the art. The mere fact that a term or phrase used in the claim has no antecedent basis in the specification disclosure does not mean, necessarily, that the term or phrase is indefinite. There is no requirement that the



words in the claim must match those used in the specification disclosure. MPEP 2173.05(e).

Accordingly, the rejections are inappropriate and Appellants respectfully request that the rejections be reversed.

## 2. **Conventions in this Appeal Brief**

In the arguments herein, limitations of the claims are indicated in *italics* and the references of record are indicated by underlining.

In separate arguments of patentability for separate claims (or groups of claims), Appellants have, where possible, referred to prior arguments to avoid undue repetition.

In the arguments below, Appellants refer to:

- Office Action: Office Action mailed November 23, 2004 (Paper No. 31).

The following Groups of claims are referred to in this Appeal Brief:

GROUP I.	Claims <b>11</b>
GROUP II.	Claims <b>14</b>
GROUP III.	Claim <b>35</b>
GROUP IV.	Claim <b>36</b>
GROUP V.	Claim <b>39</b>
GROUP VI.	Claims <b>40</b>
GROUP VII.	Claim <b>25, 33, 37</b>

The claims in the different Groups do not stand and fall together. Each of the Groups is addressed below under a separate heading.

**3. Section 112, ¶ 2 Rejection for Indefiniteness**

Claims **11, 14, 35, 36, 39 and 40** stand rejected under 35 U.S.C. § 112, ¶ 2 as being indefinite.

The Indefiniteness rejection is argued separately for the following Groups of appealed claims:

Group I	Claim <b>11</b>
Group II	Claim <b>14</b>
Group III	Claim <b>35</b>
Group IV	Claim <b>36</b>
Group V	Claim <b>39</b>
Group VI	Claim <b>40</b>

The claims in the different Groups do not stand and fall together. Each of the Groups is addressed below under a separate heading.

### 3.1. GROUP I: Claim 11

Group I include independent claim 11. That claim is rejected because the Examiner asserts that the following claim language "is not clear":

*"successively time-consuming supplementary product offers correspond to successively greater ranges of activity rates"*

The Examiner has not even attempted to present a prima facie showing that one of ordinary skill in the art would not understand the scope of the claim when the claim is read in light of the rest of the specification.

The entirety of the Examiner's basis for rejecting various claims as indefinite are (1) the conclusory statements that certain terms are "not clear", and (2) the conclusory statements that "support for such [terms] is not apparent" from the application. Office Action, page 4. These conclusory statements are not only unclear themselves, they also leave the record completely silent as to required factual determinations that must be made to determine whether a claim is definite. Accordingly, no prima facie showing of indefiniteness has been made.

Further, at least the ordinary dictionary definitions of the terms in dispute provides a definite meaning to the terms and to the claims that employ those terms. However, the Examiner has neither referred to any ordinary dictionary definition, nor any definitions at all for any term in any rejection for

indefiniteness. Accordingly, there has been no prima facie showing of indefiniteness of any claim.

### **3.1.1. The Legal Standard for Definiteness of a Claim**

The rejections for indefiniteness are based on terms which lack explicit, 'word-for-word' antecedent basis. However, explicit antecedent basis is not required for a claim to have an ascertainable meaning to one of ordinary skill in the art. The mere fact that a term or phrase used in the claim has no antecedent basis in the specification disclosure does not mean, necessarily, that the term or phrase is indefinite. There is no requirement that the words in the claim must match those used in the specification disclosure. MPEP 2173.05(e).

Applicants are given a great deal of latitude in how they choose to define their invention so long as the terms and phrases used define the invention with a reasonable degree of clarity and precision. MPEP 2173.05(e)

Applicants note that MPEP § 2173.05(e) explains this issue:

"Obviously, however, the failure to provide explicit antecedent basis for terms does not always render a claim indefinite. If the scope of a claim would be reasonably ascertainable by those skilled in the art, then the claim is not indefinite."

Per MPEP § 2173.02, definiteness of claim language must be analyzed, not in a vacuum, but in light of:

- (A) The content of the particular application disclosure;
- (B) The teachings of the prior art; and
- (C) The claim interpretation that would be given by one possessing the ordinary level of skill in the pertinent art at the time the invention was made.

The Examiner has made none of these factual findings, nor has the Examiner determined the pertinent art, nor the ordinary level of skill in that art.

Nevertheless, the allegedly objectionable terms and phrases from the rejected claims have very definite meaning, regardless of whether the Examiner might have chosen alternative language.

### **3.1.2. The Claim is not Indefinite**

Independent claim 11 recites the following, which the Examiner has deemed unclear:

*successively time-consuming supplementary product offers correspond to successively greater ranges of activity rates*

Not only is the ordinary meaning of this phrase clear and definite, the specification provides an ample description of the meaning of this phrase.

According to various described embodiments, time-consuming offers (offers with a low "offer speed") are made during periods of low terminal activity,

while quicker offers (offers with a high "offer speed") are made during periods of higher terminal activity. [*Present Application*, page 5, lines 1 - 6; *see also* page 8, line 15 - 17; page 8, line 25 - page 9, line 4]

The specification describes particular categories of offers and how time consuming they are relative to each other. For example, additional product offers typically have low "offer speeds", since it may be several seconds for a cashier to retrieve the additional product if the offer is accepted by the customer. [*Present Application*, page 8, lines 27 - 28]. Typically, printing a coupon is quicker than offering an additional product, and so a coupon offer has a higher offer speed. [*Present Application*, page 8, line 29 - page 9, line 2].

Accordingly, performing supplementary processes during periods of low activity, yet reducing or refraining from supplementary processes during periods of high activity, can result in increased profit. Such increased profit can exceed the profit of POS terminals that either always perform the supplemental process or never perform the supplemental process. [*Present Application*, page 4, lines 28 - 31]

Figures 4 and 7 depict illustrative offer schedules that depend on activity rates. Note in particular that FIG. 4 depicts *successively time-consuming supplementary product offers* (i.e. additional product vs. a coupon) and their *corresponding successively greater ranges of activity rates* (i.e. < 8 transactions per minute vs. 8 - 15 transactions per minute). Similarly, FIG. 7 depicts *successively time-consuming supplementary product offers* (i.e. additional product vs. a coupon) and their *corresponding successively greater ranges of activity rates* (i.e. 50% - 80% usage vs. 81% - 90% usage).

The Examiner has not indicated what terms in particular are misunderstood, or why the phrase would be unclear. Accordingly, no prima facie showing of indefiniteness has been made. Moreover, the specification clearly provides the meaning of the phrase in dispute.



## **SEPARATE ARGUMENT OF PATENTABILITY**

### **3.2. GROUP II: Claim 14**

Group II include independent claim 14. That claim is rejected because the Examiner asserts that the following claim language "is not clear":

*"successively time-consuming supplementary product offers correspond to successively greater ranges of activity rates"*

This language is the same as that discussed above with respect to claim 11 (Group I). In fact, claim 14 is an apparatus claim that corresponds to method claim 11. Accordingly, the arguments above with respect to indefiniteness of claim 11 apply to claim 14 as well.

Claim 11 (Group I) is argued separately above because that claim was also rejected under 35 U.S.C. § 101, while claim 14 was not so rejected.

## **SEPARATE ARGUMENT OF PATENTABILITY**

### **3.3. GROUP III: Claim 35**

Group III include independent claim 35. That claim is rejected because the Examiner asserts that the claim language '*offer speed*' "is not clear".

The Examiner has not even attempted to present a prima facie showing that one of ordinary skill in the art would not understand the scope of the claim when the claim is read in light of the rest of the specification.

The entirety of the Examiner's basis for rejecting various claims as indefinite are (1) the conclusory statements that certain terms are "not clear", and (2) the conclusory statements that "support for such [terms] is not apparent" from the application. Office Action, page 4. These conclusory statements are not only unclear themselves, they also leave the record completely silent as to required factual determinations that must be made to determine whether a claim is definite. Accordingly, no prima facie showing of indefiniteness has been made.

Further, at least the ordinary dictionary definitions of the terms in dispute provides a definite meaning to the terms and to the claims that employ those terms.

The requisite legal analysis is set forth above in Section 3.1.1.

Claim 35 recites the following

*a first upsell having an first offer speed*

*a second upsell having a second offer speed*

Not only is the ordinary meaning of these phrases clear and definite, the specification provides an ample description of the meaning of these phrases.

According to various described embodiments, time-consuming offers (offers with a low "offer speed") are made during periods of low terminal activity, while quicker offers (offers with a high "offer speed") are made during periods of higher terminal activity. [*Present Application*, page 5, lines 1 - 6; *see also* page 8, line 15 - 17; page 8, line 25 - page 9, line 4]

The specification describes particular categories of offers and how time consuming they are relative to each other. For example, additional product offers typically have low "offer speeds", since it may be several seconds for a cashier to retrieve the additional product if the offer is accepted by the customer. [*Present Application*, page 8, lines 27 - 28]. Typically, printing a coupon is quicker than offering an additional product, and so a coupon offer has a higher offer speed. [*Present Application*, page 8, line 29 - page 9, line 2].

The Examiner has not indicated why the phrase would be unclear. Accordingly, no prima facie showing of indefiniteness has been made. Moreover, the specification clearly provides the meaning of the phrase in dispute.

## **SEPARATE ARGUMENT OF PATENTABILITY**

### **3.4. GROUP IV: Claim 36**

Group IV include independent claim **36**. That claim is rejected because the Examiner asserts that the claim language '*offer speed*' "is not clear".

This language is the same as that discussed above with respect to claim **35** (Group III). In fact, claim **36** is an apparatus claim that corresponds to method claim **35**. Accordingly, the arguments above with respect to indefiniteness of claim **35** apply to claim **36** as well.

Claim **35** (Group I) is argued separately above because that claim was also rejected under 35 U.S.C. § 101, while claim **36** was not so rejected.

## **SEPARATE ARGUMENT OF PATENTABILITY**

### **3.5. GROUP V: Claim 39**

Group V include independent claim **39**. That claim is rejected because the Examiner asserts that the claim language '*offer speed*' "is not clear".

The Examiner has not even attempted to present a prima facie showing that one of ordinary skill in the art would not understand the scope of the claim when the claim is read in light of the rest of the specification.

The entirety of the Examiner's basis for rejecting various claims as indefinite are (1) the conclusory statements that certain terms are "not clear", and (2) the conclusory statements that "support for such [terms] is not apparent" from the application. Office Action, page 4. These conclusory statements are not only unclear themselves, they also leave the record completely silent as to required factual determinations that must be made to determine whether a claim is definite. Accordingly, no prima facie showing of indefiniteness has been made.

Further, at least the ordinary dictionary definitions of the terms in dispute provides a definite meaning to the terms and to the claims that employ those terms.

The requisite legal analysis is set forth above in Section 3.1.1.

Claim **39** recites the following

*the first upsell having an first offer speed*

*the second upsell having a second offer speed*

Not only is the ordinary meaning of these phrases clear and definite, the specification provides an ample description of the meaning of these phrases.

As discussed above in Section 3.3 with respect to claim 35 (Group III), the specification provides ample clarification of the term "offer speed".

The Examiner has not indicated why the phrase would be unclear. Accordingly, no prima facie showing of indefiniteness has been made. Moreover, the specification clearly provides the meaning of the phrase in dispute.

## **SEPARATE ARGUMENT OF PATENTABILITY**

### **3.6. GROUP VI: Claim 40**

Group VI include independent claim **40**. That claim is rejected because the Examiner asserts that the claim language "*first predetermined threshold*" and "*second predetermined threshold*" are not clear".

The Examiner has not even attempted to present a prima facie showing that one of ordinary skill in the art would not understand the scope of the claim when the claim is read in light of the rest of the specification.

The entirety of the Examiner's basis for rejecting various claims as indefinite are (1) the conclusory statements that certain terms are "not clear", and (2) the conclusory statements that "support for such [terms] is not apparent" from the application. Office Action, page 4. These conclusory statements are not only unclear themselves, they also leave the record completely silent as to required factual determinations that must be made to determine whether a claim is definite. Accordingly, no prima facie showing of indefiniteness has been made.

Further, at least the ordinary dictionary definitions of the terms in dispute provides a definite meaning to the terms and to the claims that employ those terms.

The requisite legal analysis is set forth above in Section 3.1.1.

Claim **40** recites the following

*if the activity rate is below the first predetermined threshold, ...*

*if the activity rate is above the second predetermined threshold, ...*

Not only is the ordinary meaning of these phrases clear and definite, the specification provides an ample description of the meaning of these phrases.

In one embodiment, the POS terminal 10 compares the activity rate to a predetermined threshold. [*Present Application*, page 6, line 31 - page 7, line 1] Such a threshold may be determined (step 44) in a number of ways. For example, the threshold may be a predetermined value (e.g. a rate of three transactions per minute), or a variable value (e.g., three transactions per minute after 5:00 PM, two transactions per minute otherwise). Many methods of calculating thresholds, based on many variables such as time of day and day of the week, will be understood by those skilled in the art. [*Present Application*, page 7, lines 1 - 5]

Once the threshold is determined, the activity rate may be compared to the predetermined threshold (step 46). [*Present Application*, page 7, lines 6 - 7] One comparison is to determine whether the activity rate is less than the threshold. For example, the POS terminal 10 may determine whether the measured number of completed transactions in the last ten minutes is less than a predetermined threshold of seven transactions per ten minute period. [*Present Application*, page 7, lines 7 - 10]



The Examiner has not indicated why the phrase would be unclear. Accordingly, no prima facie showing of indefiniteness has been made. Moreover, the specification clearly provides the meaning of the phrase in dispute.

## **SEPARATE ARGUMENT OF PATENTABILITY**

### **4. Section 112, ¶ 2 Rejection for Indefiniteness**

The following arguments apply to the claims rejected under 35 U.S.C. § 101 (i.e. claims **11, 25, 33, 35, 37 and 39**). Accordingly, the following arguments regarding the patentability of the claims under 35 U.S.C. § 101 apply to Groups I (claim **11**), III (claim **35**), V (claim **39**) and VII (independent Claims **25, 33, and 37**).

The Examiner has not made a *prima facie* case that any claim is directed to non-statutory subject matter.

The Examiner has failed to indicate any authority for rejecting a claim because it may be performed in the mind of a user or by pencil and paper, or to rebut Appellants' evidence to the contrary.

The Examiner has proposed a novel legal test, which is contrary to the Federal Circuit's "useful, concrete and tangible result" standard.

The proper legal test for statutory subject matter was not applied to the rejected claims. Accordingly, the Examiner cannot have presented a *prima facie* case that any claim is nonstatutory. In fact, applying the proper legal standard demonstrates that all claims are directed to statutory subject matter.

#### **4.1. "Technological Arts" standard has no basis in law**

One issue in this case is whether the Examiner's legal standard for determining whether a claim is directed to non-statutory subject matter under Section 101 has any basis in law.

##### **4.1.1. The Examiner's test is a baseless and contrary to law**

As best as Appellants understands the rejection of the claims for being directed to non-statutory subject matter, the basis for that rejection is that the claimed steps "can be performed in the mind of a user or by use of a pencil and paper." (Office Action, page 3, 1<sup>st</sup> paragraph) In other words, the Examiner's position is that a claim is nonstatutory if:

- (c) the claim does not *preclude* a 'mental' embodiment even if it covers computer-performed embodiments; and / or
- (d) the claim does not *preclude* a manual (e.g., 'pencil and paper') embodiment even if it covers computer-performed embodiments.

The Examiner also cites to, but apparently does not rely on, the following proposition:

"For a process claim, the recited process must somehow apply, involve, use or advance the technological arts" (Office Action, page 3)

As described below, the standards relied on by the Examiner are not the correct standards for determining whether a claim is statutory. To the extent the

rejection applies a standard that requires additional criteria or otherwise departs from the requisite legal analysis under Section 101, the rejection is contrary to law.

There is no legal authority for the Examiner's proposition that claims must preclude mental and manual embodiments. The legal test for the presence of statutory subject matter is only that a claimed process or apparatus produce a "useful, concrete and tangible result". See, e.g., State Street Bank & Trust Co. v. Signature Fin. Group, Inc., 149 F.3d 1368, 1375, 47 U.S.P.Q.2D 1596 (Fed. Cir. 1998), cert. denied, 525 U.S. 1093, 142 L. Ed. 2d 704, 119 S. Ct. 851 (1999)

The Examiner's Section 101 two-prong test departs starkly from current Federal Circuit law. In particular, the Examiner's Section 101 test flies in the face of the definitive "practical application" standard, rendered in State Street Bank v. Signature Financial Trust, 149 F.3d 1368, 47 USPQ2d 1596 (Fed. Cir. 1998), cert. denied, 119 S. Ct. 851 (1999) and AT & T Corp. v. Excel Communications Inc., 172 F.3d 1352, 50 USPQ2d 1447 (Fed. Cir. 1999), for determining whether subject matter is statutory. In fact, the Examiner has not even addressed the current standard as defined by these two cases.

The Examiner's Section 101 two-prong test is also contrary to law because it necessarily defines a new category of subject matter (i.e., claimed processes that do not recite "technology") as being unpatentable under Section 101. There are exactly three categories of unpatentable subject matter that have been recognized by the Supreme Court: abstract ideas, natural phenomena, and laws of nature. Diamond v. Diehr (1981). See also, MPEP § 2106, p. 2100-11 (8th ed.

Rev. 2, May 2004). The Examiner cannot establish that Appellants' claims fall into any of these exceptions.

**4.1.2. The Examiner's standard is irreconcilable with relevant case law**

The Examiner's test is contrary to law because in applying it the Examiner holds that a process is directed to unpatentable subject matter merely because it might be capable of also being performed by a human or in the mind of a human. The mere fact that some or all of the steps of a method "may be carried out in or with the aid of the human mind" does not render a sequence of operational steps non-statutory under 35 U.S.C. §101. In re Musgrave (C.C.P.A. 1970).

The court in Musgrave rejected the Examiner's reasoning that the claims at issue were non-statutory under 35 U.S.C. §101 because they "include no physical steps but set forth merely a method for processing data which does not require any tangible device or apparatus to carry out the method and hence could be carried out mentally." Musgrave, 431 F.2d at 886. See also, In re Prater, 415 F.2d 1378, 56 C.C.P.A. 1376 (C.C.P.A. 1968) ("patent protection for a process disclosed as being a sequence or combination of steps, capable of performance without human intervention...is not precluded by the mere fact that the process could alternatively be carried out by mental steps."); Musco Corp. v. Qualite, Inc., Civ. Application, 106 F.3d 427, 1997 WL 16031 (Fed. Cir. 1997), (per curiam) (unpublished), cert. denied, 118 S. Ct. 60 (1997) ("The existence of mental steps in the claims or specification of a patent do not, in and of themselves, invalidate the patent.").

The Examiner continues to ignore this clear case law and is transparently attempting to resurrect an explicitly overruled “mental steps” doctrine

The Examiner’s test is also contrary to law because in applying it the Examiner holds that a process is directed to unpatentable subject matter merely because one or more steps are capable of being performed by use of a pen and paper. The Examiner has never attempted to cite any legal authority in support of such a finding.

The Examiner’s analysis is also irreconcilable with the relevant case law because the claims undeniably produce a useful, concrete and tangible result (as described below). Specifically, a claim cannot be “only an abstract idea” and also provide for a practical application (i.e., produce a useful, concrete and tangible result).

The Examiner’s Section 101 two-prong test departs starkly from current Federal Circuit law. It allows for the contradictory possibility (as evidenced by the present circumstances) that a claimed process can produce a useful, concrete and tangible result, yet still be directed to non-statutory subject matter.

#### **4.2. Claims are directed to statutory subject matter**

Another issue in this case is whether, regardless of whether the Examiner's test has any basis in law, the claims are directed to statutory subject matter.

**4.2.1. Claims do not fall within any recognized exception to  
statutory subject matter**

All the claims produce a useful, concrete, and tangible result. For example, independent claims **11 and 14** produce the following useful, concrete and tangible result: *providing a supplementary product offer*. Similarly, independent claims **25, 26, 33, 34, 37, 38** produce the following useful, concrete and tangible result: *offering to exchange the upsell price for the upsell*; independent claims **35 and 36** produce the following useful, concrete and tangible result: *offering an upsell*; and independent claims **39 and 40** produce the following useful, concrete and tangible result: *exchanging the upsell for the offered upsell price*.

Such *offers* or *exchanges* are not abstract, disembodied numbers, but instead have a specific meaning and as such they each correspond to a useful, concrete or tangible result - something which can motivate people to make purchases. The invention claimed can by no stretch of the imagination be classified as “abstract ideas”. Thus, the claims are properly-defined statutory processes.

Although not recognized by the Examiner, the existence of a useful, concrete, and tangible result necessarily means that the invention is not only an abstract idea, per AT&T and State Street Bank. The Examiner’s attempt to characterize an alleged failure to be within "the technological arts" as equivalent to being “only an abstract idea” is baseless and contradictory.

There are only three exceptions to statutory subject matter: abstract ideas, laws of nature, and natural phenomena. Since the claims fall into none of those exceptions, the claims must define statutory subject matter.

#### 4.3. Requests for Clarification

Appellants invite the Examiner to comment in the Examiner's Answer on the following issues:

- What is the Examiner's authority for rejecting a claim for being able to be performed in the mind of a user or by pencil and paper? Nothing in Musgrave, State St. Bank, or AT&T would support such a holding.
- What is the Examiner's authority that failure to be "within the technological arts" (if such a requirement exists) necessarily means a claimed process is directed "only to an abstract idea"? How does the Examiner reconcile such an assertion with State St. Bank, which sets forth the definitive analysis of whether a claimed invention is non-statutory because of the presence of an abstract idea? In other words, if the "technology" requirement was not addressed in State St. Bank, but State St. Bank defined how to determine whether a claim is directed to only an "abstract idea," how can the Examiner maintain that the "technology" requirement is of any use in determining whether a claim is directed "only to an abstract idea"?



#### 4.4. **Conclusion**

The Examiner has not set forth a *prima facie* case that any claim is directed to non-statutory subject matter under § 101 or is otherwise unpatentable.

The Examiner has failed to indicate any authority for rejecting a claim because it may be performed in the mind of a user or by pencil and paper.

Accordingly, the claims are allowable.

## CONCLUSION

Thus, the Examiner's rejection of the pending claims is improper at least because the Examiner has not provided a proper legal basis for rejecting any claim. Therefore, Appellants respectfully request that the Examiner's rejections be reversed.

If any issues remain, or if there are any further suggestions for expediting allowance of the present application, please contact Michael Downs using the information provided below.

Appellants hereby request any extension of time that may be required to make this Appeal Brief timely. Please charge any fees that may be required for this paper, or credit any overpayment, to Deposit Account No. 50-0271.

Respectfully submitted,

October 12, 2005

Date

A handwritten signature in black ink, appearing to read 'Dean Alderucci', is written over a horizontal line.

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## **APPENDIX A—CLAIMS**

**Claims 11, 14, 25, 26 and 33 - 40** are pending.  
All claims are independent.

1 - 10 (CANCELED)

11. A method for controlling the performance of a supplementary process at a point-of-sale terminal, comprising:

measuring an activity rate of a point-of-sale terminal; and

providing a supplementary product offer in accordance with the activity rate and an offer schedule;

in which the offer schedule comprises a set of supplementary product offers, each supplementary product offer corresponding to a predetermined range of activity rates, and

in which successively time-consuming supplementary product offers correspond to successively greater ranges of activity rates.

12 - 13 (CANCELED)

14. An apparatus for controlling the performance of a supplementary process at a point-of-sale terminal, comprising:

a storage device; and

a processor connected to the storage device,

the storage device storing a program for controlling the processor;

and

the processor operative with the program to:

measure an activity rate of a point-of-sale terminal; and

provide a supplementary product offer in accordance with the activity rate and an offer schedule;

in which the offer schedule comprises a set of supplementary product offers, each supplementary product offer corresponding to a predetermined range of activity rates, and

in which successively time-consuming supplementary product offers correspond to successively greater ranges of activity rates.

15 - 24 (CANCELED)

25. A method for controlling the performance of a supplementary process at a point-of-sale terminal, comprising:

- measuring an activity rate of a point-of-sale terminal; and
- if the activity rate is less than a predetermined threshold,
  - determining an upsell in dependence on a purchase,
  - determining an upsell price in dependence on the purchase,

and

- offering to exchange the upsell price for the upsell.

26. An apparatus for controlling the performance of a supplementary process at a point-of-sale terminal, comprising:

a storage device; and

a processor connected to the storage device,

the storage device storing a program for controlling the processor;

and

the processor operative with the program to:

measure an activity rate of a point-of-sale terminal; and

if the activity rate is less than a predetermined threshold,

determine an upsell in dependence on a purchase,

determine an upsell price in dependence on the purchase, and

offer to exchange the upsell price for the upsell.

27 - 32 (CANCELED)

33. A method for controlling performance of a supplementary process at a point-of-sale terminal, comprising:

receiving an override signal; and

if the override signal indicates performance of a supplemental

process,

determining an upsell in dependence on a purchase,

determining an upsell price in dependence on the purchase,

and

offering to exchange the upsell price for the upsell.

34. An apparatus for controlling performance of a supplementary process at a point-of-sale terminal, comprising:

- a storage device; and
- a processor connected to the storage device,
- the storage device storing a program for controlling the processor;

and

- the processor operative with the program to:
  - receive an override signal; and
  - if the override signal indicates performance of a supplemental process,

- determine an upsell in dependence on a purchase,
- determine an upsell price in dependence on the purchase, and
- offer to exchange the upsell price for the upsell.



35. A method for controlling performance of a supplementary process at a point-of-sale terminal, comprising:

measuring an activity rate of a point-of-sale terminal; and

if the activity rate is below a first predetermined threshold, offering a first upsell having an first offer speed; and

if the activity rate is above a second predetermined threshold, offering a second upsell having a second offer speed greater than the first offer speed.

36. An apparatus for controlling the performance of a supplementary process at a point-of-sale terminal, comprising:

a storage device; and

a processor connected to the storage device,

the storage device storing a program for controlling the processor;

and

the processor operative with the program to:

measure an activity rate of a point-of-sale terminal; and

if the activity rate is below a first predetermined threshold,

offer a first upsell having an first offer speed; and

if the activity rate is above a second predetermined threshold,

offer a second upsell having a second offer speed

greater than the first offer speed.

37. A method for controlling the performance of a supplementary process at a point-of-sale terminal, comprising:
- measuring an activity rate of a point-of-sale terminal; and
  - if the activity rate is less than a predetermined threshold,
    - determining an upsell in dependence on a purchase,
    - determining an upsell price in dependence on change due from the purchase, and
    - offering to exchange the upsell price for the upsell.

38. An apparatus for controlling the performance of a supplementary process at a point-of-sale terminal, comprising:

a storage device; and

a processor connected to the storage device,

the storage device storing a program for controlling the processor;

and

the processor operative with the program to:

measure an activity rate of a point-of-sale terminal; and

if the activity rate is less than a predetermined threshold,

determine an upsell in dependence on a purchase,

determine an upsell price in dependence on change due from

the purchase, and

offer to exchange the upsell price for the upsell.

39. A method, comprising:
- measuring an activity rate of a point-of-sale terminal;
  - determining an upsell price in dependence on change due from a purchase,
  - if the activity rate is below the first predetermined threshold, offering a first upsell for a supplementary product, the first upsell having an first offer speed;
  - if the activity rate is above the second predetermined threshold, offering a second upsell for a supplementary product, the second upsell having a second offer speed greater than the first offer speed; and
  - exchanging the upsell for the offered upsell price.

40. An apparatus comprising:

- a storage device; and
- a processor connected to the storage device,
- the storage device storing a program for controlling the processor;

and

- the processor operative with the program to:
  - measure an activity rate of a point-of-sale terminal;
  - determine an upsell price in dependence on change due from a purchase,
  - if the activity rate is below the first predetermined threshold, offer a first upsell for a supplementary product, the first upsell having an first offer speed;
  - if the activity rate is above the second predetermined threshold, offer a second upsell for a supplementary product, the second upsell having a second offer speed greater than the first offer speed; and
  - exchange the upsell for the offered upsell price.

**APPENDIX B—EVIDENCE - *NONE***

<NONE>

**APPENDIX C—RELATED PROCEEDINGS - *NONE***

<NONE>